Supreme Court, U. S.
FILED
OCT 3 1978
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-567

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

**to the Court of Appeal, State of California,
First Appellate District**

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to the Court of Appeal, State of California, First Appellate District

Petitioner, Jeffrey Richard Robbins, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California in and for the First Appellate District (1/Crim. 14387) entered in this matter on May 22, 1978.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District and the subsequent amendment thereto, and the order of the Supreme Court of California on July 5, 1978, denying a petition for hearing, none of which have been reported, are reproduced in the appendix.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §§ 1257 and 2101, this being a petition arising out of a state criminal conviction. The petition is filed within 90 days of July 5, 1978.

QUESTION PRESENTED

Is the Fourth Amendment violated by a ruling that sealed luggage and packages contained in the trunk of an immobilized automobile after the driver's arrest may be opened and inspected without warrant or emergency?

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts we state are undisputed in the record unless otherwise indicated.[1]

[1]The following designations have been used in this brief: P.H. (Reporter's Transcript of Preliminary Hearing); R.T.S. (Reporter's Transcript of Special Suppression Hearing); R.T. Reporter's Transcript on Appeal); R.T.J.S. (Reporter's Transcript of Judgment and Sentencing); C.T. (Clerk's Transcript).

The Stop

On January 5, 1975 at 1:45 a.m., while traveling along Interstate 80 in the foggy and very cold morning hours, Officer DePue of the California Highway Patrol observed petitioner's stationwagon, between one tenth and one quarter mile distant, traveling on Nelson Road. (R.T.S. 4:16-28, 9:26-27, 5:1-7; R.T. 65:6-9)

Despite the difficult viewing conditions, which limited visability to one quarter of a mile, Officer DePue formed an opinion that petitioner was driving too slowly. (R.T.S. 6:2-3) It was later established that this opinion was mistaken and based upon DePue's mistaken belief that the speed limit on Nelson Road was much higher than it actually was. (R.T. 202:13-28, 229:26-239:9, 240:5-241:19)

Viewing the distant scene in this false light, DePue likewise believed he observed petitioner twice cross over the broken yellow road line, once three feet and once a full vehicle width. (R.T. 6:9-16, 7:24-8:4) DePue, however, never testified that his limited view of the distant scene allowed him to determine whether these alleged maneuvers were in violation of law.

Upon exiting the freeway Officer DePue and his partner, Officer Stoltz, stopped petitioner to question him about his driving. Since the road did not have a shoulder, petitioner's vehicle was stopped in the middle of the right hand roadway. (R.T. 75:8-19)

Petitioner stepped out of his stationwagon and produced his driver's license. (R.T.S. 8:11-22) Asked to produce a registration, petitioner returned to his car and proceeded to look for the registration. (R.T.S. 8:25-28) While the

door was opened Officer DePue detected the odor of burned marijuana. (R.T.S. 9:28-10:21) Immediately upon receiving petitioner's registration, DePue arrested petitioner for driving under the influence of marijuana. (R.T.S. 20:20-25, 9:16-17)

The Automobile Search

A search of the passenger compartment then followed. Several entries were made into the vehicle which yielded evidence to support the basis for the arrest: two pairs of tweezers, one with a hand-rolled cigarette butt, and a cookie tin containing cigarette papers and approximately ⅛th oz. of marijuana. (R.T.S. 11:27-12:9, R.T.S. 17:17-18:12, P.H. 25:4-5)

While this search took place Robbins was kept spread-eagled against his still-running car, breathing in the fumes from its exhaust. (P.H. 7:11-16, R.T.S. 10:21-25, R.T. 80:17-18) At some point he was overcome by these fumes and fell into the middle of the oncoming roadway, where he vomited.

Still standing outside in what Officer DePue described as a very cold night, Robbins was swallowing rapidly and perspiring profusely. (R.T.S. 14:15-16, 9:26-27) He began saying irrational things and looked wild-eyed. (R.T.S. 15:12-17, P.H. 26-28) He was then handcuffed. (R.T.S. 15.12-28) Shortly thereafter Robbins allegedly stated to Sergeant Stoltz, "What you are looking for is in the back." (R.T.S 15:26-16:6, R.T. 120:23-25) Robbins was then removed from the cold and placed in the patrol vehicle. (R.T. 50:8-12)

The Luggage Search

Removing the keys from the petitioner's ignition, DePue unlocked and opened the tailgate of the wagon. (R.T. 50:13-15) Picking up the floor rug, DePue discovered a luggage compartment under the floor in the rear deck of the wagon. (P.H. 22:16-18) Pulling a handle set flush into the deck, DePue opened the luggage compartment and observed therein two pieces of luggage and two sealed packages. (*Id.* P.H. 23:7-24:6)

DePue proceeded to open up these items. He first opened up a brown leather tote bag and discovered a masonry jar and three white plastic bags, each of which was double taped. (R.T. 133:6-7) After they were opened these items were found to contain a total amount of marijuana in excess of one pound. (P.H. 25:9-13)

DePue next removed and opened a brown leather briefcase and rummaged through petitioner's clothing. (P.H. 13:17-18, R.T. 54:28-55:9) DePue then removed a package wrapped in opaque green plastic and sealed closed. (P.H. 13:28-14:21, R.T. 57:20-17) Upon opening the package DePue discovered a block of marijuana weighing approximately fifteen pounds. (P.H. 25:6-8) Finally, DePue removed and opened a similar package containing approximately the same amount of marijuana. (*Id.*)

The Proceedings In The Trial Court

Petitioner was charged with counts of possession of marijuana, possession of marijuana for sale, transportation of marijuana, and driving under the influence of a drug.

On January 14, 1975 during the preliminary hearing in the municipal court, petitioner's counsel orally objected to the introduction into evidence of all articles taken during the warrantless search of the trunk. (P.H. 26) The court reserved counsel's objection but permitted the items to be received in evidence. (P.H. 26-27)

On March 24, 1976 petitioner's motion to suppress all tangible evidence as obtained in violation of petitioner's constitutional rights came on for hearing and was denied. (R.T.S. 2-37)

Petitioner was convicted of possession of marijuana, possession for sale, and transportation of marijuana, but found *not guilty* of driving under the influence of a drug. Petitioner was sentenced to prison for a term of five years to life and has been released on bail pending this Petition after serving only a portion of this sentence.

Proceedings In The Appellate Courts

On May 9, 1978 the Court of Appeal, First Appellate District, reaching the merits of the Fourth Amendment contention, affirmed the conviction below. (Appendix) The court upheld the warrantless search of the luggage and sealed packages in the luggage compartment "as falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion at p. iv, App.)

On July 5, 1978 the Supreme Court of the State of California denied a petition for hearing.

REASONS FOR GRANTING THE WRIT

I

THE FOURTH AMENDMENT'S WARRANT REQUIREMENT IS NOT SUBJECT TO AN ABSOLUTE "AUTOMOBILE EXCEPTION" WHEN SEIZED ITEMS ARE SAFEGUARDED WITHIN A SECURELY CLOSED PACKAGE WITHIN A CLOSED LUGGAGE COMPARTMENT IN AN AUTOMOBILE.

The issue in this case arises under the Fourth Amendment's Warrant Clause as applied to state action under the Fourteenth Amendment. Petitioner's conviction is founded upon the evidence secured during the warrantless search of the inner contents of luggage and securely wrapped packages which had been safeguarded in the luggage compartment of his stationwagon.

At the time of this search petitioner had already been arrested for driving under the influence of marijuana (for which he was later found not guilty). Petitioner was both handcuffed and locked into the back seat of the highway patrol cruiser. Petitioner's auto had been immobilized and a decision had been made by the police to impound it. Thus the luggage and packages were immobilized and within the exclusive dominion and control of police authority from the moment of their discovery. Conceding as we must[2] under *Chambers v. Maroney,* 399 U.S. 42 (1970) that petitioner's automobile could be thoroughly examined by the arresting officers, we raise the question of whether this examination extends lawfully to warrantless and non-

[2]We reserve the right to agree with the dissent of Mr. Justice Harlan in *Chambers v. Maroney,* infra, should this Petition be granted.

emergency inspection of the contents of sealed packages and luggage.

The luggage and securely wrapped packages could have easily been removed from the luggage compartment to the police station in their original sealed condition. It is not claimed that there was any police necessity for rummaging through petitioner's luggage and packages in the middle of a dark and foggy roadway. On the contrary, the police conduct unnecessarily prolonged a highway hazard.

Nor has the state or any court claimed that petitioner, who was physically sick and exhausted, irrational and emotionally beaten at the time of his alleged statement, "What you are looking for is in the back," knowingly and voluntarily waived his Fourth and Fourteenth Amendment rights.

A. Warrant Clause

While "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness . . . 'except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant.' *Camera v. Municipal Court,* 387 U.S. 523, 528-529 (1967)." *Cady v. Dombrowski,* 413 U.S. 433 (1973). The constitutional policy of the Fourth Amendment is to place the deliberate judgment of the magistrate between the citizen and the police whenever practicable. Mr. Justice Jackson, writing for the court in *Johnson v. United States* makes the classic statement of this policy:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must yield to the right of search is as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. 333 U.S. 10, 13-14.

See also *Coolidge v. New Hampshire,* 403 U.S. 433, 449 (1971); *United States v. Chadwick,* 433 U.S. 1, 9 (1977); *Wong Sun v. United States,* 371 U.S. 471, 481-482 (1963).

Thus, whether Officer DePue had probable cause to search the contents of petitioner's luggage and securely wrapped packages is not relevant to the question we raise. The Warrant Clause was designed to avoid the type of hurried and sweeping inference-reaching process involved in DePue's decision to search when no exigency was presented and privacy was obviously desired by petitioner by reason of the sealed nature of the packages opened and by reason of their location in the closed trunk. This court should squarely so rule.

B. United States v. Chadwick

Except for the possibility that automobiles and every square inch of even the most private of their contents are categorically exempt from the Warrant Clause, we believe that luggage and sealed package cases such as ours should be controlled by this court's landmark decision in *United States v. Chadwick,* 433 U.S. 1 (1977) and its cornerstone, ***Ex Parte Jackson,*** 96 U.S. 727 (1878).

In *Chadwick* the police had probable cause to believe that a footlocker placed in an automobile trunk contained marijuana. The footlocker had been seen to be leaking talcum powder, a substance used to mask the odor of marijuana and hashish. A trained dog released near the footlocker also signaled the presence of marijuana. Before the car could pull away an arrest was made of Chadwick, while the footlocker was seized and taken into federal custody. One and a half hours later the footlocker was opened without a warrant. Large amounts of marijuana were found.

This court held that since there was no exigency, the warrantless search violated the Fourth Amendment. To reach its decision in *Chadwick*, this court reaffirmed the century-old principles of *Ex Parte Jackson*, 96 U.S. 727, 733 (1878), extending the protection of the Warrant Clause to papers and packages "closed against inspection, wherever they may be." 433 U.S. at 10. After a comprehensive review of the cases extending the Warrant Clause outside the home, the Chief Justice, writing for the Court, stated:

> . . . These cases . . . reflect the settled constitutional principle . . . that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable invasions of legitimate privacy and not simply those interests found inside the four walls of the home. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).
>
> In this case, important Fourth Amendment privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. . . . [O]ne who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the government to conduct this search without the safeguards a judicial warrant provides. 433 U.S. at 11.

The words of *Chadwick* should also control in cases of properly stopped vehicles in transit which contain in closed compartments luggage and sealed packages, items securely "closed against inspection," under circumstances where it is reasonable to have "an expectation that their contents would remain free from public examination." Safeguarding "personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause."

Petitioner, indeed, manifested a greater expectation of privacy than did Chadwick. Petitioner safeguarded his luggage and packages by sealing them and storing them in the privacy of a covered and recessed luggage compartment. Chadwick, by contract, launched his olfactable luggage to pass on its own through the hands of third parties and exposed it to public sight and smell while leaking talcum powder. If *Chadwick* is not to be thought of as flotsam in the sea of precedent, packages exhibiting the seals of privacy must have the same protection under the Warrant Clause when there is no exigency.

C. The Principles of the "Automobile Exception"

United States v. Chadwick, supra, should thoroughly dispose of the claim that automobile search cases are invariably different in principle from the scope of the War-

rant Clause as described in *Ex Parte Jackson, supra.* Yet the opposite is true. As we point out below, *Chadwick* has not been applied to the automobile search which extends to sealed packages.

In *Chadwick,* the Chief Justice noted that the treatment of the automobile under the Fourth Amendment is based upon two factors:

> 1. the automobile's "inherent mobility;" 433 U.S. at 12;
>
> 2. "the diminished expectations of privacy which surround the automobile." (Id.)

The Court holds that though these factors applied to Chadwick's automobile, they do not apply to the footlocker seized from the trunk of the automobile. The factors which diminish the privacy aspects of an automobile do not apply to luggage contents:

> The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspection and official scrutiny on a continuing basis. Unlike an automobile, whose primary purpose is transportation, luggage is intended as a repository of personal effects. 433 U.S. at 13.

Nor does the factor of mobility any longer apply to luggage and packages once they are within police custody:

> Nor does the footlocker's mobility justify dispensing with the added protection of the Warrant Clause. . . . The initial seizure and detention of the footlocker,

> the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant. 433 U.S. at 13.

Dealing with a general rule for closed packages and luggage within an auto, we perceive no reason why *Chadwick* should not carry the day. The factors which diminish the privacy aspects of an automobile and its contents do not apply to the closed luggage and packages seized from a closed luggage compartment. That compartment, in petitioner's case covered by a rug, was only discovered after removing the keys from the ignition and unlocking the tailgate. Just as in *Chadwick,* the contents of the luggage and packages therein would not be "open to public view except as a condition of border entry."[3]

Nor does the prior mobility of the luggage and packages within petitioner's stationwagon add anything new once the vehicle has been stopped, its handcuffed driver had been locked into the patrol cruiser, and the luggage and packages had been seized. Indeed, more than anything else, *United States v. Chadwick* stands for the proposition that when an object is of seizable size its prior

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[3]A vehicle inspection might require the opening of the trunk, but not the opening of packages in the trunk. California vehicle storage might necessitate the listing of items in plain view but not the opening of closed packages. *Mozzetti v. Superior Court,* 4 C.3d 699, 707, 712 (1971); *People v. Lands,* 30 C.A.3d 487, 492 (1973). See also R.T. 216. The only time that luggage or sealed packages in a trunk could themselves be opened would be at the time of border entry. *United States v. Chadwick,* 433 U.S. 1, 13. This, however, is because of the border entry itself and not because of the automobile and is a rule of broad application, not just to automobiles.

mobility is constitutionally irrelevant once the police exercise dominion and control over the object:

> Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. 433 U.S. at 15.

Four state appellate courts and one federal district court have therefore followed this court's decisions in *Chadwick, supra,* and held that the so-called "automobile exception" does not extend to searches of luggage contents within an automobile. *Sanders v. State,* 559 S.W.2d 704 (S.C. Arkansas 1978); *State v. Dean,* 574 P.2d 572 (Kan. App. 1978); *State In Interest of D.H.,* 380 A.2d 295 (N.J. Super. 1977); *People v. Hamilton,* 371 N.E.2d 1234, 1238-1239 (C.A.Ill. 1978); *United States v. Vallieres,* 443 F. Supp. 186, 191 (D.Conn. 1977).

Both the Ninth Circuit Court of Appeals, *United States v. Finnegan,* 568 F.2d 637 (9th Cir. 1977) and the California Court of Appeal in this case have held quite the opposite, that the automobile exception is absolute.

II

THE "AUTOMOBILE EXCEPTION" IS NOT LIMITLESS

Having established that traditional Warrant Clause principles compel holding that the warrantless search inside petitioner's luggage and sealed packages violated the Fourth Amendment's Warrant Clause, the crucial

issue is whether an "automobile exception" exists in some absolute sense, outside even its own policy boundaries. If so, the Warrant Clause has no application, so long as a search could properly be labeled as a probable cause "automobile" search. By this view, *United States v. Chadwick* could be distinguished as not properly an "automobile" search because of the brevity of the contract with the automobile.

This was apparently the view of the California Court of Appeal in upholding the warrantless seizure in this case. That court read *Chambers v. Maroney,* 399 U.S. 42 (1970) as a declaration of an absolute freedom from the Warrant Clause for everything inside of an automobile irrespective of the scope of the privacy invasion and considerations of exigency, so long as probable cause to search exists. According to the opinion below, *"United States v. Chadwick* . . . did not call into question the continued effectiveness of the automobile exception." (Appendix A, p. v).

This approach to constitutional law allows the determination of whether a precious constitutional right exists to turn on the glib and grim supposition that automobiles have been entirely read out of the Warrant Clause. The decisions of this Court, we believe, are not meant to support such a view of constitutional rights. As Mr. Justice Stewart states for the court in *Coolidge v. New Hampshire,* 403 U.S. 433, 461-62 (1971):

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears.

Contrary to the contention of the California Court of Appeal and similar holdings we have mentioned, *Chambers v. Maroney,* 399 U.S. 42 (1970) does not create an "automobile exception" absolutely authorizing warrantless searches of automobiles and all of their contents on probable cause alone. *Chambers* involved an automobile escaping from a gun robbery of a gas station. It was the search of *the car* which yielded the guns used as evidence against the defendants. They were discovered in a compartment under the dashboard, but not in sealed packages or luggage. No search of luggage or sealed packages took place. The Court upheld the search as follows:

> On the facts before us, the blue stationwagon could have been searched on the spot when it was stopped, since there was probable cause to search and it was a fleeting target for a search. 399 U.S. at 52.

The Court then upheld a search at the stationhouse since "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." 399 U.S. at 52. This second aspect of the holding, the stationhouse search, was based upon the right to search the automobile at the scene of the stop. It does not eliminate warrant considerations for everything within an automobile.

If it were a constitutional principle that the Warrant Clause had no application to anything within an automobile, dangerous consequences, antithetical to principles of privacy and security, would ensue. A stopped motorist, as to whom there was probable cause that he might be carrying contraband, would have his locked briefcase

searched, no matter how confidential. An attorney could not prevent the files of his cases from being looked through, a government employee carrying confidential papers for use in a sensitive governmental decision not yet for public release would expose that decision to public view, and in a stop involving alleged bad checks or other papers which might be evidence of crime, every paper in the automobile could be read without warrant.

Suppose federal agents stop an automobile containing two individuals. The passenger is wanted for tax evasion. The trunk of the car contains a locked safe. The driver of the car claims that the safe is his and that it contains his confidential papers. Federal agents disbelieve this and think that the safe contains the suspect's confidential papers which may help to establish their case. The agents, under the decision under review, may open the safe without warrant. Thus there would be irretrievable damage from a breach of the security and privacy which the Fourth Amendment is meant to protect from warrantless scrutiny.

Obtaining a warrant would allow such closed packages to be searched on probable cause without risk that their use as evidence would be reduced. But the magistrate could put limits on the scope of the search and require a prompt inventory of all contents. These protections are not waived in all circumstances merely by riding in a car.

In *Chambers,* no right to search packages or luggage closed against inspection was claimed. This court therefore carefully notes that certain types of automobile searches might require the extra protection of privacy afforded by a warrant:

> Neither *Carroll, supra,* nor other cases of this court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. 399 U.S. 42, at 50.

In *South Dakota v. Opperman,* 428 U.S. 364, another automobile search case, this court, after noting that automobile searches must always be tested against the constitutional mandate of reasonableness, quotes Mr. Justice Black:

> The test of reasonableness cannot be fixed by per se rules; each case must be decided by its own facts. Id. at 373, quoting *Coolidge v. New Hampshire,* 403 U.S. at 509-510 (Justice Black, concurring and dissenting.)

Mr. Justice Powell, after a thorough review of this court's automobile search cases also carefully notes:

> [*T*]*hese decisions establish no general "automobile exception" to the warrant requirement.* See *Preston v. United States,* 376 U.S. 364 (1964). Rather they demonstrate that 'for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars' . . . a difference that *may* in *some* cases justify a warrantless search. *South Dakota v. Opperman,* 428 U.S. 364, 382 (1976) (J. Powell, concurring) (Emphasis added.)

Justice Blackmun's plurality opinion in *Cardwell v. Lewis,* 417 U.S. 583 (1974) affirms this conclusion and points to our standard. In that case the police obtained a warrant for the arrest of Lewis who they suspected of murder. After securing his arrest at the police station they towed his car from a nearby commercial parking lot to a police impoundment lot. A warrantless probable

cause examination of the exterior revealed that a tire matched the case of a tire impression made at the crime scene and that paint samples taken from respondent's car were not different from foreign paint on the fender of the victim's car.

Justice Blackmun upholds the probable cause seizure of the car under the authority of *Chambers v. Maroney, supra,* (417 U.S. 583 at 593-595). In upholding the warrantless probable cause examination of the *exterior* Justice Blackmun notes on two separate occasions that the result might be different where traditional privacy interests are invaded:

> Again, we are not confronted with any issue as to the propriety of a search of the car's interior. 'Neither *Carroll, supra,* nor other cases of this court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords.' 399 U.S. at 592, n. 8.
>
> . . . This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of the desire to be mobile does not, of course waive one's right to be free from unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry. 417 U.S. at 591.

We think this court ought to make it clear that the "automobile exception" does not swallow privacy interests in packages and luggage.

III

CONCLUSION

Encounters between citizens and police on the highway are one of the principal testing points for the Fourth Amendment. The present conflict surrounding the scope of Fourth Amendment rights on the highway is not solved. Despite repeated assertions to the contrary by many members of this Court, lower courts still adhere to the view that *Chambers v. Maroney,* 399 U.S. 42, creates an absolute exception to the Warrant Clause which is independent of constitutional principles. So long as this misunderstanding is allowed to persist many police authorities will undoubtedly exploit it, giving rise to many judicial proceedings infected by constitutional error.

This court can now call an end to the confusion which has so long surrounded the so-called "automobile exception." See Amsterdam, *Perspectives on the Fourth Amendment* (1974) 58 Minn.L.Rev. 349. The opinions of this court have fully distilled an absolutely clear set of guidelines which need only be implemented to be better understood. The Fourth Amendment right to the impartial and deliberate judgment of a judicial officer does not turn on a choice of words. Insofar as the protection of the Warrant Clause extends to a motor vehicle or its contents, "it is the right to privacy which is the touchstone of our inquiry." *Cardwell v. Lewis,* 417 U.S. 583, 591. This court's landmark decision in *United States v. Chadwick,* 433 U.S. 1 fully states this constitutional command:

> Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view when no exigency is shown

> to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. *Id.* at 16.

For these reasons a Writ of Certiorari should be granted.

Dated, September 29, 1978.

Respectfully submitted,

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(Appendices Follow)

Appendices

Appendix A

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

In the Court of Appeal
of the
State of California, First Appellate District,

Division Four

1/Crim. 14387
(Superior Court 10357)

The People,
Plaintiff and Respondent,
vs.
Jeffrey Richard Robbins,
Defendant and Appellant.

[Filed May 9, 1978]

OPINION

Jeffery [sic] Richard Robbins appeals from a judgment of imprisonment which was rendered after a jury found him guilty of possession of marijuana (Health & Saf. Code, § 11357), possession of marijuana for sale (Health & Saf. Code, § 11359) and transportation of marijuana (Health & Saf. Code, § 11360). The notice of appeal designated both the judgment and the order denying the motion to suppress evidence; the latter order is not appealable (*People v. Jochen* (1975) 46 Cal.App.3d 243) and the purported appeal from it is to be dismissed.

On January 5, 1975, at 1:45 a.m., California Highway Patrol Officer DePue noticed appellant driving eastbound on Nelson Road which parallels Interstate Route 80. As DePue watched from his position on Interstate 80 (about 1/10 of a mile from appellant), appellant crossed the center line of the road twice, once the full width of the car. DePue thought that appellant's speed was excessively slow. DePue and his partner, Sergeant Stoltz, followed appellant and stopped him "to determine why [he] was operating outside of a marked road lane."

Appellant immediately stepped out of his vehicle and approached the Highway Patrol car, meeting DePue halfway between the vehicles. DePue asked for Robbins' operator's license and evidence of registration. Appellant perspired heavily, swallowed rapidly, had watery bloodshot eyes and had difficulty in removing his license from his wallet. DePue, who followed Robbins to the car, smelled the odor of burned marijuana when appellant opened the door. The officer also saw smoke in the car's interior.

DePue patted appellant down for weapons and found only a vial of liquid. The officers saw on the front seat of the passenger compartment a pair of tweezers of a type used to hold marijuana roaches. DePue entered the car to get these tweezers and was interrupted when appellant began to vomit in the road. Two further entries of the passenger compartment by DePue yielded two pairs of tweezers, one with a burned hand-rolled cigarette butt, and a cookie tin which contained two packs of cigarette papers and a plastic baggie containing marijuana.

While Officer DePue searched the passenger compartment, appellant said to Sergeant Stoltz, "what you are

looking for is in the back." The officers then placed appellant in the patrol car and DePue searched the luggage compartment of appellant's automobile. This search yielded two securely wrapped bricks of marijuana and a tote bag containing another 2.2 pounds of marijuana. Appellant was advised of his *Miranda* rights about ten minutes after the contraband was discovered. Prior to the warning appellant had made several voluntary statements, including asking Sergeant Stoltz what it would take "to get out of this." Robbins then told Stoltz to check his left pocket, which was found to contain $521.

I.

Appellant contends that the officers were not justified in stopping his car. He points out that the arresting officers were mistaken in their belief that the roadway being used by appellant was a 55 mile-per-hour zone. In fact, the posted advisory speed limit was apparently 35 miles per hour; thus, the fact that appellant was driving only 30 miles per hour could not be taken as grounds for suspicion. But other circumstances short of probable cause to make an arrest may justify stopping a vehicle for investigation. (*People v. Mickelson* (1963) 59 Cal.2d 448.) California courts have upheld stops based on observation of erratic driving (*People v. Boddie* (1969) 274 Cal.App.2d 408), driving a truck in the dark without headlights (*People v. Norman* (1975) 14 Cal.3d 929) and equipment violations (*People v. Grace* (1973) 32 Cal.App.3d 447; *Willett v. Superior Court* (1969) 2 Cal.App.3d 555).

Appellant cites *Wirin v. Horrall* (1948) 85 Cal.App.2d 497, as a case where a vehicle stop was held to be based

on insufficient cause, therefore precluding introduction of evidence obtained in the subsequent search of the car. But the *Wirin* case involved police blockades set up in Los Angeles which resulted in stops and searches of vehicles without any cause even to issue traffic citations. The *Michelson* test is on the spectrum between the absence of cause found in the *Wirin* stops and full probable cause to arrest. In 1977, the United States Supreme Court set forth the test for stops in circumstances short of probable cause for arrest. (*Pennsylvania v. Mimms* (1977) ..... U.S. ..... [54 L.Ed.2d 331].) The case involved a stop to issue a traffic ticket. The court held that the test is always the reasonableness of a particular governmental invasion of a citizen's personal security. That reasonableness depends on the balance between the public interest and the individual's right to personal security free from arbitrary interference. (*Pennsylvania v. Mimms, supra,* citing *Terry v. Ohio* (1968) 392 U.S. 1, and *United States v. Brignoni-Ponce* (1975) 422 U.S. 873.) Therefore, probable cause to issue a traffic citation is sufficient justification for a vehicle stop. The officers saw a car weaving on a curving two-lane road. This observation gave reason to stop the driver "to find out why [he] was operating outside of a marked road lane," e.g., for the purpose of protecting the public against the hazard of a driver who inferably might be intoxicated or too sleepy to drive safely. Appellant contends, citing *Mestas v. Superior Court* (1972) 7 Cal.3d 537, 542, that to uphold the lawfulness of the stop on that basis would go beyond the factual basis established in the trial court. But the purpose stated in the officer's testimony was sufficient to cover both the illustrations we have mentioned. It was lawful to stop appellant's car.

After the arresting officers learned that appellant was in possession of marijuana, they searched the interior of appellant's vehicle, the luggage compartment, and the contents of various packages and suitcases found in the interior and luggage compartment of the vehicle. Appellant does not dispute the existence of probable cause to search the interior and trunk of the vehicle. However, he contends that the warrantless search of the luggage and sealed packages in the luggage compartment violated the Fourth Amendment.

Appellant bases his argument on *United States v. Chadwick* (1977) 433 U.S. 1 [53 L.Ed.2d 538]. In *Chadwick,* the United States Supreme Court held that the warrantless search of a footlocker removed from the trunk of a car was not justified either by the automobile exception or as a search incident to an arrest. *Chadwick* is readily to be distinguished from the present case. In *Chadwick,* federal agents had been alerted to the possible presence of contraband in a footlocker which they had under surveillance long before its placement in the automobile. While holding that the automobile exception[1] did not justify a warrantless search under the particular circumstances, the decision did not call into question the continued effectiveness of the automobile exception. Recent California decisions have upheld warrantless searches of automobiles even where the element of exigency has ceased to exist (*People v. Hill* (1974) 12 Cal.3d 731 [warrantless search of automobile sustained although defendants were under arrest and their car had been impounded]; *People v. Superior Court* (*Gutierrez*) (1977) 69 Cal.App.3d 335 [warrantless search

[1]See *Chambers v. Maroney* (1970) 399 U.S. 42.

of impounded automobile subsequent to arrest of defendants for burglary upheld].) Here, the odor of marijuana and presence of marijuana and paraphernalia in the interior of the automobile, amplified by appellant's voluntary statement that what they were looking for was in the back, gave ample cause to search the baggage compartment and open suspicious-looking packages which they found there. The case falls within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause.

II.

Appellant contends that the trial court erred when it refused to consider his renewed motion to suppress made during trial. It is clear that once a defendant's motion to suppress evidence has been denied at a special Penal Code section 1538.5 hearing in the superior court, the trial judge should not entertain a renewed motion at trial unless there is an intervening change in the applicable law or the discovery of new evidence.[2] (*People v. Superior Court (Edmonds)* (1971) 4 Cal.3d 605, 610.)

On the second day of the trial, defense counsel moved to suppress evidence, asserting that the posted speed limit at the site of the arrest is 35 miles per hour rather than 55 miles per hour. The defense argued that this discovery destroyed the probable cause necessary for the initial stop. The motion was denied. Appellant contends that this

[2]Penal Code section 1538.5, subdivision (h):

If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

is new evidence within the meaning of Penal Code section 1538.5, subdivision (h), and that the motion should have been granted.

The Californa Supreme Court in *People v. Martinez* (1975) 14 Cal.3d 533, 537, recognized a "due diligence" limitation on the availability of a belated motion to suppress under section 1538.5, subdivision (h). The court held that a motion to suppress raised at trial was properly denied when based on information defense counsel could have obtained at any time simply by interviewing his client. The present case is similar. It may be questioned whether appellant realized the actual speed limit prior to trial. However, it is clear that defense counsel could have discovered the true speed limit simply by visiting the scene of the arrest, an act which falls within the scope of due diligence. Under the *Martinez* limitation appellant's motion to suppress at trial was properly denied. (See *People v. Burke* (1974) 38 Cal.App.3d 708, 713.)

III.

Appellant contends and respondent concedes that the sentence must be stayed as to the possession for sale count. In *People v. Sanders* (1967) 250 Cal.App.2d 123, and *In re Adams* (1975) 14 Cal.3d 629, the court recognized that while possession for sale is a crime separate from transporting, where both were part of an indivisible course of conduct which has a single objective double punishment would violate Penal Code section 654.

Appellant further contends that the offense of possession must be included within the offense of possession for sale. But the jury found appellant guilty of separate counts of

possession and possession for sale, upon evidence which would support a determination that appellant possessed distinct quantities of marijuana for different purposes: a small amount in the cookie tin in the front of the car for personal use, and a large amount in the sealed packages in the baggage compartment for sale. The test for applicability of Penal Code section 654 is, "If evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*In re Adams* (1975) 14 Cal.3d 629, 634, citing *People v. Beamon* (1973) 8 Cal.3d 625, 639.) The judgment must be upheld on both possessory counts.

IV.

Appellant argues that California marijuana laws are unconstitutional. Constitutional challenges to the marijuana laws have consistently been rejected. (See *People v. Glaser* (1965) 238 Cal.App.2d 819; *People v. Aguiar* (1968) 257 Cal.App.2d 597; *People v. Oatis* (1968) 264 Cal.App.2d 324.) In a related contention it is argued that trial counsel manifested constitutional inadequacy when he failed to challenge the validity of the laws proscribing marijuana. It is not an indication of inadequacy for counsel to withold making an unsound argument.

The purported appeal from the order denying the motion to suppress evidence is dismissed. The judgment is modified to stay the sentence as to the count of possession for sale. As so modified the judgment is affirmed.

Christian, J.

We concur:

Caldecott, P.J.

Paik, J.*

*Under assignment by the Chairperson of the Judicial Council.

Appendix B

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

Crim. No. 14387
Superior Court No. 10357

People of the State of California,
Plaintiff & Respondent,
vs.
Jeffrey Richard Robbins,
Defendant & Appellant

BY THE COURT:

The written opinion filed May 9, 1978 is ordered amended at page 6, lines 9 through 12, by deleting the citation *People v. Superior Court Gutierrez*) (1977) 69 Cal App. 3d 335 [warrantless search of impounded automobile subsequent to arrest of defendants for burglary upheld].) in its entirety.

Dated May 22, 1978

CALDECOTT, P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

July 5, 1978

In have this day filed Order

HEARING DENIED

In re: 1 Crim. No. 14387

People
vs.
Robbins

Respectfully,

G. E. BISHEL
Clerk

Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-567

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court

OF THE

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OCTOBER TERM, 1978

No. 78-567

JEFFREY RICHARD ROBBINS,
Petitioner,

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STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The unpublished opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, filed on May 9, 1978, and amended on May 22, 1978, is appended to the Petition for Writ of Certiorari.[1]

[1]An earlier unpublished opinion filed on June 30, 1976, by the Court of Appeal, First Appellate District, Division Four, was vacated by that court by order filed July 22, 1977, and petitioner's appeal reinstated for further briefing and oral argument. Petitioner sought review of the earlier opinion by petition for writ of certiorari filed in the United States Supreme Court on December 14, 1976 (No. 76-817). A response to the petition was filed by the People of the State of California, following which the Court denied the petition.

On July 5, 1978, the California Supreme Court denied petitioner's application for a hearing without opinion.

JURISDICTION

Petitioner would invoke this Court's appellate jurisdiction under Title 28, United States Code sections 1257 and 2101. Jurisdiction is conferred by Title 28, United States Code, section 1257(3).

QUESTION PRESENTED

Was the Pre-*Chadwick* warrantless search of petitioner's automobile and its contents, made on the highway in the early morning, justified by probable cause?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments Four and Fourteen, section 1.

STATEMENT OF THE CASE

The District Attorney of Solano County accused petitioner Jeffrey Robbins of possession, possession for sale, and transportation of marijuana and driving under the influence of a drug, by an information filed on January 23, 1975 (CT 8-9).[2] Petitioner pleaded not guilty (CT 11), was

[2]"CT" refers to the Clerk's Transcript on Appeal; "RTS" refers to the Reporter's Transcript of the Suppression Hearing; "RT" refers to the Reporter's Transcript of trial proceedings. "PHT" refers to the Preliminary Hearing Transcript which was also considered by the court at the suppression hearing.

tried by a jury (CT 13), and convicted of possession, possession for sale, and transportation of marijuana, but acquitted on the remaining charge (CT 48-49).

Proceeding eastbound on Interstate Route 80 at 1:45 a.m. on January 5, 1975, California Highway Patrol Officer DePue noticed petitioner driving in the same direction along parallel Nelson Road (RTS 4-5). As DePue observed petitioner at a distance of about one tenth of a mile (RTS 5), Robbins twice crossed the center line of the roadway (RTS 6). Approaching a curve, petitioner's automobile drifted into the oncoming lane the full width of the vehicle, its right wheels reaching the center line (RTS 6). Robbins returned his auto to the right side of the road but while negotiating the curve drifted three feet across the center line (RTS 6-7). DePue also noted that petitioner was driving 30 miles per hour in what DePue thought was a 55 miles per hour zone (RTS 6). Judging petitioner's driving to be erratic, DePue and Sergeant Stoltz followed and stopped him "to determine why it had left—was operating outside of a marked road lane" (RTS 7).

Petitioner immediately alighted, meeting DePue midway between their vehicles (RTS 8). The officer asked for Robbins' operator's license and ownership registration (RTS 9).[3] Petitioner, perspiring profusely, swallowing rapidly,

[3]California Vehicle Code section 4454 requires owners to maintain the registration or a facsimile in their vehicle. Vehicle Code section 2804 authorizes California Highway Patrol officers, "upon reasonable belief that any vehicle is being operated in violation of any provisions of this code" to "require the driver of the vehicle to stop and submit to an inspection of the . . . registration card." Vehicle Code section 12951 obliges a driver to carry his license while driving and to present it upon demand of a peace officer enforcing traffic regulations.

his eyes bloodshot and watery, experienced difficulty in removing the license from his wallet (RT 39-40). When Robbins opened his car door to retrieve his registration, DePue, standing three to four feet behind him, smelled the familiar odor of burned marijuana within the vehicle (RTS 9-10; RT 40-42). The officer also noted smoke in the car's interior (RT 43).

DePue then pat-searched Robbins for weapons (RT 42; RTS 10), finding only a vial of a malodorous liquid (RTS 11; RT 43). DePue next entered the passenger compartment to recover a pair of tweezers observed on the front seat (RT 43, RTS 12). The patrolman previously had observed such devices used to hold marijuana roaches (RT 43). After Robbins vomited (RT 44; RTS 12), DePue reentered petitioner's auto and found two pairs of tweezers on the dashboard, one with a burned hand rolled cigarette butt, and a cookie tin on the rear floor (RT 44-45, 47). Inside the tin were two packs of cigarette papers and a plastic baggie containing marijuana (RT 48, 145).

While Officer DePue searched the passenger compartment, petitioner remarked to Sergeant Stoltz "What you are looking for is in the back" (RT 120). Stoltz repeated this to DePue. Robbins was placed in the patrol vehicle while DePue unlocked the tailgate of Robbins' station wagon, raised the floorboard and removed two marijuana bricks and a tote bag containing some 30 pounds of marijuana (RT 50-53, 140). The bricks were wrapped in green plastic (PHT 24). The bricks attracted DePue's attention because he had heard contraband was wrapped and transported in this manner (PHT 24). Inspector Grundy of the

Solano County Drug Abuse Bureau placed the street value of the seized contraband at approximately $8,000.00 (RT 190), a quantity sufficient to supply an individual user for 17 years (RT 189).

About ten minutes after the contraband was discovered Robbins was advised of his *Miranda* rights (RTS 21; RT 58). He was not interrogated by the arresting officers (RT 58). Prior to the admonition petitioner told DePue he did not wish "to take a fall for this" (RT 58), and asked Stoltz what it would take "to get out of this?" The sergeant replied that disposition would follow booking. Robbins said, "In my left pocket, check it." Petitioner's left pocket contained $521.00 (RT 122).

Petitioner testified that earlier that day he had met a woman, known to him only as Carol, who offered to pay him $500 to drive her to Los Angeles that evening (RT 274). She refused to tell him the purpose of the trip (RT 274). Petitioner nevertheless accepted the offer and the two embarked on their journey that evening. Petitioner explained the woman's absence from the car at the time of his arrest as the result of a previous disagreement between the two of them concerning directions and her use of marijuana in the car (RT 74). He testified that she exited petitioner's vehicle somewhere in Walnut Creek, leaving behind approximately 37 pounds of contraband which, unknown to petitioner, she had previously hidden in the car (RT 257, 295). She never advised petitioner of her last name nor did she give him an address or number where she could be reached (RT 292).

ARGUMENT

I

THE WARRANTLESS SEARCH OF PETITIONER'S AUTOMOBILE AND THE CONTENTS WAS JUSTIFIED BY PROBABLE CAUSE.

Petitioner contends that the search of his automobile baggage compartment and of packages found inside it violated the Fourth Amendment. He does not complain that the highway patrolman lacked probable cause; the search followed their observation of his physical condition, their noting the odor of marijuana and smoke in the passenger compartment, their discovery of what appeared to be roach-holders near the front seat and Robbins' remark "what you are looking for is in the back." Petitioner insists, however, that the officers' failure to secure a warrant is inexcusable and that the 1:45 a.m. on-the-scene search cannot be justified by the "automobile exception" to the warrant requirement. Petitioner finds *United States v. Chadwick*, 433 U.S. 1 (1977), to be controlling (Pet. 9). His contention must fail because *Chadwick* is inapplicable. The Court there condemned the warrantless search of a double-locked 200 pound footlocker seized immediately after it had been placed in Chadwick's vehicle and searched 90 minutes later after its removal to a federal building and the arrest of its possessors. The Court explained:

> "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15.

Petitioner reasons that *Chadwick* should also control "in cases of properly stopped vehicles in transit which contain in closed compartments luggage and sealed packages, items securely 'closed against inspection,' under circumstances where it is reasonable to have 'an expectation that their contents would remain free from public examination' " (Pet. 11). However, *Chadwick* did not decide that question. Instead, the Court emphasized that "the Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search . . . ." 433 U.S. at 11.

The People do contend that luggage discovered in a transporting vehicle falls within the "automobile exception" and, upon probable cause, is subject to an on-the-scene warrantless search. *A fortiori*, the exception encompasses packages not secured by any lock. The "automobile exception" is based upon the mobility of vehicles, itself an exigent circumstance, *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *People v. Laursen*, 8 Cal.3d 192, 201, 104 Cal.Rptr. 425, 431, 501 P.2d 1145, 1151 (1972), and the reduced expectation of privacy one enjoys in an automobile, *United States v. Chadwick*, 433 U.S. at 12; *People v. Dumas*, 9 Cal.3d 871, 882-883, 109 Cal.Rptr. 304, 311-313, 512 P.2d 1208, 1215-1217 (1973). Recognition of a greater expectation of privacy in personal property than in the vehicle in which it is stored or transported is neither logical nor consistent with actual expectations based upon common experience.

Decisions rendered before and after *Chadwick* confirm our view. *People v. Vermouth*, 20 Cal.App.3d 746, 757, 98 Cal.Rptr. 65, 71 (1971), ruled that "it was permissible to

search at the place or arrest and as incident thereto every part of the vehicle and any closed containers within it for weapons or contraband." *Vermouth* relied upon *Chambers*, which approved a thorough auto search extending to a compartment beneath the dashboard. 399 U.S. at 44. Federal appellate courts have reached the same result. *E.g.*, *United States v. Giles*, 536 F.2d 136, 139-140 (6th Cir. 1976); *United States v. Canada*, 527 F.2d 1374 (9th Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1104 (2d Cir. 1975); *United States v. Anderson*, 500 F.2d 1311, 1315 (5th Cir. 1974); *United States v. Evans*, 481 F.2d 990, 994 (9th Cir. 1973). Especially instructive is *United States v. Soriano*, 497 F.2d 147 (5th Cir. 1974) (en banc), *reaffirmed sub. nom. United States v. Aviles*, 535 F.2d 658 (1976). Sitting en banc, the Fifth Circuit there unanimously upheld an on-the-scene warrantless search of a suitcase removed from the trunk of a taxicab. 497 F.2d at 147. *Soriano* recognized that a different rule might apply were the luggage first removed from the scene, 497 at 150 n. 6, but nevertheless upheld on-the-scene searches. In short, the *Chadwick* rule, assumed in *Soriano*, made no difference.

Post-*Chadwick* federal decisions do conflict. In *United States v. Stevie*, 582 F.2d 1175 (8th Cir. 1978) (en banc) it was held that, although, pursuant to the "automobile exception" officers could legitimately immobilize a station wagon and seize suitcases located in the rear, *Chadwick* barred a warrantless search of an arrestee's luggage absent exigent circumstances. 582 F.2d at 1178-1179. The court reasoned that an individual's legitimate expectation that the contents of his luggage will remain free from public examination remains present whether the luggage is lo-

cated inside or outside an automobile. 582 F.2d at 1179. The requirement that a warrant be obtained under *Chadwick* was held to be triggered once officers obtained exclusive control over the luggage. *Id.*

The Ninth Circuit, however, in *United States v. Finnegan*, 568 F.2d 637 (9th Cir. 1977), points out that *Chadwick* "did not substitute a test of expectation of privacy for probable cause." 568 F.2d at 641. Noting that the Supreme Court did not address the tests for, or scope of, the automobile search exception because those issues were not before it, the Ninth Circuit expressed the following view with respect to the scope of the *Chadwick* decision:

> "*Chadwick* lays down a rule whereby courts faced with an invitation by the government to define a new class of objects which may be searched without a warrant must consider whether there is a diminished expectation of privacy with respect to that *class* of objects." 568 F.2d at 641.

It was held in *Finnegan* that *Chadwick* does not apply where there is probable cause to search luggage located in an automobile and exigent circumstances exist because the automobile containing the luggage can be moved. *Id.* The court recognized that the application of *Chadwick* to automobile exception cases would lead to inconsistent and contradictory results.

> "For instance, a police officer could search and seize a brick of marijuana lying inside the trunk of a car but not a brick of marijuana lying inside a suitcase in the trunk of a car." *Id.*

The *Finnegan* decision accurately defines the scope of the *Chadwick* holding. Unlike the decision in *Stevie*, *Finnegan* acknowledges and graphically describes the inconsistencies

and contradictions which would flow from grafting *Chadwick* onto the automobile search exception rule of *Chambers*.

Chadwick does not erode the California rule authorizing a warrantless search of an automobile and its contents where "(1) exigent circumstances rendered the obtaining of a warrant an impossible or impractical alternative, and (2) probable cause existed for the search." *People v. Dumas*, *supra*, 9 Cal.3d 871, 884, 109 Cal.Rptr. 304, 314, 512 P.2d 1208, 1218.

Probable cause existed for searching both Robbins' vehicle and his packages. *Cf. Wimberly v. Superior Court*, 16 Cal.3d 557, 567-568, 128 Cal.Rptr. 641, 647-648, 547 P.2d 417, 423 (1976). The facts which furnished probable cause were not foreseeable by the searching officers. *Contrast Chambers v. Maroney*, 399 U.S. at 51, with *United States v. Chadwick*, 433 U.S. at 3-4, and *Coolidge v. New Hampshire*, 403 U.S. 443, 471 n. 29 (1971) ("we deal here with a *planned* warrantless seizure"). It was impractical to seek a warrant at 1:45 a.m., when Robbins' auto was out on the highway. "Reason and good police procedure dictated that if the officers were to preserve the evidence of illegal activity which their investigations had uncovered, an on-the-scene search of the vehicle was mandated." *People v. Cook*, 13 Cal.3d 663, 669, 119 Cal.Rptr. 500, 503, 532 P.2d 148, 151 (1975).

Moreover, *Chadwick* involved a double-locked footlocker. There is a constitutional difference between unlocking a secured container and unwrapping a package, opening a cookie tin, or looking into a plastic baggie, as occurred here. That difference reflects varying actual expectations of privacy manifested by distinct modes of concealment.

II

PETITIONER'S FAILURE TO OBJECT AT TRIAL ON THE PRESENT GROUND COMPELS REJECTION OF HIS CLAIM HERE.

Petitioner made no objection to the introduction of the seized evidence at either the suppression hearing or trial on the ground he raises here. His failure to object compels rejection of his petition.

First, if *Chadwick* does no more than re-state existing Fourth Amendment principles as held by the Eighth Circuit in *United States v. Schleis*, 582 F.2d 1166, 1173 (8th Cir. 1978), petitioner's failure to show cause why no objection was made in the trial court bars review of the issue here. *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

Second, were *Chadwick* held to have silently overruled *Chambers*, as well as countless state cases such as *Cook* and *Vermouth*, it would not avail petitioner. *Chadwick* was announced on June 21, 1977. The search questioned here occurred January 5, 1975. At the time of this search both federal and state courts believed such searches to be lawful under *Chambers*. *See e.g. United States v. Giles*, *supra*, 536 F.2d 136; *United States v. Canada*, *supra*, 527 F.2d 1374; *United States v. Tramunti*, *supra*, 513 F.2d 1087; *United States v. Soriano*, *supra*, 497 F.2d 147; *People v. Vermouth*, *supra*, 20 Cal.App.3d 747, 98 Cal.Rptr. 65. To use this case as a vehicle to overturn *Chambers* would be to afford petitioner a windfall contrary to this Court's decisions denying retroactivity to new restrictions on searches and seizures. *See United States v. Peltier*, 422 U.S. 531, 535-542 (1975); *Desist v. United States*, 394 U.S. 244, 249-

254 (1969). If, indeed, it is presently unclear whether *Chadwick* applies to automobile searches, it is doubly so with respect to searches conducted prior to *Chadwick*. The Seventh and Ninth Circuits' rejection of the retroactive application of *Chadwick* is compelled. *United States v. Choate*, 576 F.2d 165, 182, n. 20 (9th Cir. 1978); *United States v. Berry*, 571 F.2d 2, 3 (7th Cir. 1978).

The failure of petitioner to raise this specific issue at trial has left the record less than clear in several material respects. First, the trial court made no finding concerning petitioner's consent to search. Indeed, given *Chambers* and the state of existing law, no determination was necessary concerning consent. Had petitioner advanced a theory that the warrantless search was unlawful because it breached his right to privacy, a further evaluation of consent would have been necessitated. A finding of consent would have barred any consideration by this Court of the issue now presented.

In addition, although the record indicates that entry into the back of the station wagon was achieved by unlocking the tailgate, presumably the officers had access to the back by entry through the unlocked front doors of the vehicle.[4] Another matter which most certainly would have been developed had a *Chadwick*-type objection been made, was whether the plastic-wrapped bricks constituted, in fact, contraband in plain view. Officer DePue testified that his attention was drawn to the bricks because he had heard

[4]The fact that the officer entered the back of the station wagon by unlocking the tailgate did not come to light at all during the pre-trial suppression proceedings, but was first revealed at trial (RT 50).

that contraband was packaged and transported in this manner (PHT 4). A finding that the bricks were contraband in plain view would render petitioner's argument with respect to the tote bag harmless beyond a reasonable doubt. *Chapman v. California*, 384 U.S. 18, 24 (1967). Thus, the absence of any pre-trial or trial objection by petitioner to the admission of seized evidence on the present ground, requires rejection by this Court of this petition for a writ of certiorari.

CONCLUSION

While a split of authority among circuit courts on the question whether *Chadwick* modifies *Chambers* might tempt this Court to grant certiorari in this case, the failure of petitioner to object to the admission of evidence at trial on the ground advanced here and the resultant deficient state court record compels otherwise. While no specific findings were made by the trial court, the state of the evidence is such that had an objection been made a rejection thereof would have been appropriate because petitioner consented to the search and Officer DePue found the marijuana bricks in plain view.

The search in this case occurred almost two and a half years prior to the *Chadwick* decision. This Court's previous rejection of retroactive application to new restrictions on searches mandates dismissal of this petition. To grant the petition is to afford petitioner a windfall clearly contrary to all this Court's decisions denying retroactivity. And, even if *Chadwick* does not state a new restriction upon searches, petitioner has not shown cause why no objection

was made in the trial on the ground asserted here. His failure to do so bars review of the issue by this Court under *Wainwright.*

Dated, December 8, 1978.

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Supreme Court, U. S.
FILED
DEC 29 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-567

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

REPLY TO OPPOSITION

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removed from the *luggage compartment of a stationwagon.* In *Sanders* there was no arrest prior to the search; in our case there had been an arrest.

Petitioner submits that these distinctions do not make a constitutional difference since in each case the actions of the accused reasonably manifested an expectation that his privacy would not be violated without warrant. Respondent seizes upon these distinctions, urging that the manner of access to the luggage compartment and the type of sealed container do make a difference in this case. (*Opposition To Petition For Writ of Certiorari,* at p. 10 and pp. 12-13) Thus, irrespective of the Court's decision in *Sanders v. State of Arkansas, supra,* respondent's constitutional approach may nevertheless persist on the highways, in the trial courts, and in the appellate courts.

This type of constitutional ambiguity can and should be dealt with while the Court is presented with the opportunity. By demonstrating the operation of the constitutional rule in different factual settings, moreover, this Court definitively isolates the principle from the factual setting of a particular case and completes the outlines of the controlling constitutional principle. This Court did exactly this in its companion decisions in *Terry v. Ohio,* 392 U.S. 1 (1968), and *Sibron v. New York, Peters v. New York,* 392 U.S. 40, and the bench and bar have benefited from the application of the "stop and frisk" principle to the different facts of those cases.

This Court likewise benefits from the participation of additional counsel with different perspectives and the experiences of different jurisdictions to draw upon.

II. THE RECORD BELOW SQUARELY RAISES THE ISSUE OF THE WARRANTLESS SEARCH OF THE LUGGAGE AND PACKAGES IN THE LUGGAGE COMPARTMENT.

A. The Issue Was Properly Raised Below.

Respondent claims that "Petitioner made no objection to the introduction of the seized evidence at either the suppression hearing or the trial on the ground he claims here." (*Opposition To Petition For Writ of Certiorari,* p. 11.) Respondent is mistaken. Petitioner raised the issue of the warrantless search of the luggage compartment at every possible level: once to the Municipal Court, once to the Superior Court, to the California Court of Appeal, and to the Supreme Court of California. As we point out momentarily, the Court of Appeal squarely considered and denied our constitutional point without any discussion of how it was raised below.

Thus, at the January 15, 1975 Preliminary Hearing in the Municipal Court defense counsel objected to the search of the articles taken from the luggage compartment on the specific ground that "It was a search without warrant.":

> Mr. Ross: (Defense Counsel) I would object to all the articles taken from the rear compartment of the stationwagon being introduced into evidence.
>
> Mr. Ross: . . . The compartment, your Honor, if I might ask your [the People's] stipulation at this time. I notice we didn't ask in the testimony, it was sort of obvious, a stipulation that this wasn't a warranted search. It was a search without a warrant. (P.H. 26)[1]

[1]The following designations have been used in this brief: P.H. (Reporter's Transcript of Preliminary Hearing); R.T.S. (Reporter's Transcript of Special Suppression Hearing); R.T. (Reporter's Transcript on Appeal).

The Municipal Court nevertheless upheld the search on the ground that there was "reasonable cause to search for contraband." (P.H. 27) The Court, however, specifically reserved counsel's objection for the record. (P.H. 26)

The objection was made a second time in the Superior Court Suppression Hearing, wherein the matter was submitted on the basis of the transcript of the Preliminary Hearing. (R.T.S. 3:5-6; 4:1-7)

On appeal this issue was again raised *and passed upon* by the California Court of Appeal. (See Opinion of the Court of Appeal, reproduced in the Appendix to the *Petition for A Writ of Certiorari,* at p. v.) The objection was again made to the Supreme Court of California in the petition for hearing which that court denied.

B. There Was No Consent To The Challenged Search.

Not once, in the face of petitioner's objections to the warrantless search, has the State ever contended that petitioner consented to the warrantless search. Thus the California Court of Appeal did not mention or pass upon the consent question. It is therefore grossly inaccurate for the State to characterize its own course of action in not previously claiming that there was consent as based upon a "deficiency in the record." (Brief in Opposition, pp. 12-13) The State's right to claim consent to an illegal search has simply been waived.

The reasons for the State's failure to urge this point at any level below are, moreover, obvious from the record. Thus, while Robbins allegedly told the police that "what they are looking for is in the back," the circumstances leading up to this statement and Robbins' "vulnerable subjective state" (see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226, 229) at the time clearly establish that there was no free and voluntary waiver of a constitutional right within the meaning of the *Schneckloth* case.

Prior to his alleged making of the statement Robbins was kept spread-eagle against his still running car, breathing in the noxious fumes from its exhaust. (P.H. 7:11-16; R.T.S. 10:21-25; R.T. 80: 17-18) Robbins was overcome by these fumes and fell into the middle of the oncoming roadway where he vomited. (P.H. 10:17-18; R.T.S. 13:12-17) He was removed from the middle of the roadway and handcuffed but still kept outside in the cold. (R.T.S. 9:26-27; R.T.S. 15:12-28; P.H. 10:19-20) Immediately prior to making the alleged statement he was seen to be swallowing rapidly and perspiring profusely, saying irrational things and looking wild-eyed. (R.T.S. 14:15-16; 15:12-17; P.H. 26-28)

C. The Contraband Was Not In Plain View.

It is likewise surprising that the State should attempt to benefit from a second so-called "deficiency in the record" on account of its own failure to ever urge below that the sealed packages were "contraband in plain view." (*Opposition To Petition For Writ Of Certiorari,* at pp. 12-23) Whatever rights the State may have once had to make such a contention must now be deemed waived. The "plain view" contention also strains plain English. Each of the opaque green packages were securely wrapped and tightly sealed. Their contents were never exposed to "plain view." (P.H. 13-14, 23-24)

Respondent, indeed, confuses the concept of "probable cause" with the concept of "plain view." But even in terms of probable cause, there was much less probable cause in this case than in *United States v. Chadwick,* 433 U.S. 1, where the container was leaking a suspicious powder and a trained dog indicated the presence of marijuana within the container.

The record, moreover, does not support a claim that Officer DePue was attracted to the green packages. Thus although the District Attorney attempted to elicit from DePue a contention that he was attracted to the green packages, DePue did not so testify and instead discredited as "merely hearsay" statements that he had heard that contraband is sometimes packaged in this manner:

> Q: (District Attorney) . . . [N]othing about these two plastic wrapped green blocks that attracted your attention?
>
> A: (DePue) I had previous knowledge of transportation of such blocks. Normally contraband is wrapped in this way, merely hearsay. I had never seen them before. (P.H. 24)

The record, moreover, decisively establishes that DePue's attention was less attracted to the two sealed packages than to the other objects in the luggage compartment. Thus, according to DePue, when he opened up the luggage compartment he observed four objects "lying side by side" and "spread out within the area" of the compartment: a tote bag, a brown leather briefcase, and two green packages. (P.H. 22-24) DePue's attention was first attracted to the tote bag which he opened up. (P.H. 11:12-26; R.T. 51:24-27) His attention was next attracted to the Mason

jars and white plastic packages inside the tote bag, which items he next opened up. (R.T. 51-55) His attention then turned to the brown leather briefcase wherein he examined petitioner's clothing. (P.H. 13:17-18; R.T. 54:28-55:9) It was only at this point, after all the other items in the luggage compartment had been removed and examined, that DePue's attention was attracted to the sealed packages and he opened them. (P.H. 13:19-20; R.T. 55:10-13)

D. Retroactivity Arguments Are Not Applicable.

Respondent finally claims that the petition should not be granted since the search of the luggage compartment occurred prior to *United States v. Chadwick,* 433 U.S. 1. The date of the search does not make the issue under the Warrant Clause any more, or less, justiciable. In *Sanders v. State of Arkansas,* No. 77-1497, the issue is already joined before this Court in the context of a pre-*Chadwick* search.

Most importantly, *United States v. Chadwick,* carefully anticipated this problem by describing its holding as no more than a restatement of "settled constitutional principle." 433 U.S. 1, at 11. This language was noted and followed by the Eighth Circuit, en banc, in *United States v. Schleis,* 582 F.2d 1166, 1173 (1978). There is a split of authority among circuit courts on this question (see *United States v. Choate,* 576 F.2d 165, 182, n. 20 (9th Cir. 1978); *United States v. Berry,* 571 F.2d 2, 3 (7th Cir. 1978)), but as the Eighth Circuit pointed out in *Schleis,* that case would not have been remanded to the Court of Appeals had *Chadwick* not been retroactive. 582 F.2d at 1173, n.6.

For these reasons a Writ of Certiorari should be granted.

Dated: December 20, 1978.

Respectfully submitted,

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